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**Pensioners over prisoners: amending the Scotland Act
in response to *Somerville* and *Napier***

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Pensioners over prisoners: amending the Scotland Act in response to *Somerville* and *Napier*

Daithí Mac Síthigh

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Abstract: Comments on the political response to the House of Lords ruling in *Somerville v Scottish Ministers* that claims brought under the Scotland Act 1998 alleging that an administrative action violated the European Convention on Human Rights 1950 were not subject to the same one-year limitation period as claims under the Human Rights Act 1998 alleging that a public authority had breached the Convention. Evaluates the solution selected for the Convention Rights Proceedings (Amendment) (Scotland) Act 2009, and compares the approaches of other jurisdictions concerning the application of a limitation period to fundamental rights claims.

1. INTRODUCTION

‘Not only are we as a government having to shell out millions to prisoners, we’re also facing future claims and are unable to free up £50m in a time of recession that could be spent on pensioners, not on prisoners’

Kenny MacAskill, Scottish Justice Secretary
BBC Radio 4, 12 March 2009¹

Acts of public authorities that violate the rights protected by the European Convention on Human Rights are unlawful acts across the UK according to section 6 of the Human Rights Act 1998. In addition, the Scotland Act provides that both legislation and acts of the Government are *ultra vires* if they violate Convention rights, as well as the competence limits

¹ Recording available at http://news.bbc.co.uk/today/hi/today/newsid_7939000/7939085.stm [‘Radio 4’].

of the Scotland Act and other restrictions. The interaction between human rights and devolution is a necessarily complex one, and has been the subject of ongoing academic and judicial attention.

In particular, although actions against public authorities in respect of unlawful acts under the Human Rights Act are the subject of a time bar of one year (which can be extended by the court), through section 7(5) of the Act, but the Scotland Act contains no such restriction. Although prescient commentators had pointed this out on a number of occasions,² it was some time before the point was fully heard. It was thus confirmed in 2007, by a divided House of Lords in *Somerville v Scottish Ministers*³, that an action pursuant to the Scotland Act arguing that an administrative action violates the Act (including a claim based on violation of a Convention right) is a separate matter to a claim for breach of a Convention right by a public authority under the Human Rights Act. In practice, this meant that an applicant can challenge a decision of the Scottish government in the former fashion and the defender cannot rely on a time bar. Himsworth, Jamieson and others have all written about the reasoning in *Somerville* and its impact on human rights claims as well as constitutional issues in Scotland and the UK more generally.⁴ However, the subsequent political debate and legislative response to *Somerville*, ultimately contained in the Convention Rights Proceedings (Amendment) (Scotland) Act 2009, deserves further analysis. It is argued in this article, drawing on aspects of O'Neill's recent contributions on Scottish constitutional approaches in these pages⁵ and in other publications⁶ that an opportunity for a mature, constitutionally innovative response to *Somerville* has been missed.

2. THE POLITICAL RESPONSE: NO MORE *NAPIER*, SORT OUT *SOMERVILLE*

² See for example Clyde & Edwards, *Judicial Review* (Edinburgh: W Green, 2000) [7.38].

³ [2007] UKHL 44, 2008 SC (HL) 45.

⁴ C Himsworth, 'Conflicting interpretations of a relationship: damages for human rights breaches' (2008) 12 Edinburgh L Rev 321; I Jamieson, 'Remedies under the Scotland Act: implications of *Somerville*' (2007) 40 SLT (News) 289.

⁵ A O'Neill, 'Limited government, fundamental rights and the Scottish constitutional tradition' (2009) 14 Jur Rev 85

⁶ A O'Neill, 'Constitutional judicial review in Scotland – some recent developments' [2009] JR 267

In political terms, the greatest impact of *Somerville* was on the large number of potential claims in relation to ‘slopping out’ in Scottish prisons. This practice has ceased, but not before a finding in 2005 (*Napier v Scottish Ministers*)⁷ that this practice, in Napier’s case, constituted a violation of Article 3. Without a time bar, then, there were a substantial number of persons (prisoners who were required to slop out after the Scotland Act came into force) whose rights have been violated, and could therefore bring a claim under the Scotland Act. Provision was made for £66.7m in respect of compensation and legal costs, with £11.2m paid out (in settlements) by 2009 in respect of 3,737 cases. A further 1,223 cases were under consideration as of March 2009 and the Justice Minister told Parliament that an average of 200 claims are raised each month. Allegations have also been made that the system for out-of-court settlement has been abused and carries with it the risk of identity fraud.⁸

The Scottish government pointed to the difficulties that this situation presents on a number of occasions. Requests for legislative change were made almost immediately.⁹ Initially, the Lord Chancellor agreed to discuss the matter with the Scottish government, but no agreement was reached. The Scottish government was critical of the lack of action,¹⁰ and the matter was taken up at a high level by the First Minister and further negotiations entered into. The issue was again raised by Edinburgh in 2009 (including a concerted engagement with the UK-wide media, including the interview with the Scottish Justice Secretary quoted in the introduction to this piece). Political agreement appeared to have been reached by March 2009, with a terse joint statement from the First Minister and Scottish Secretary noting agreement in principle to ‘a quick and practical solution to the anomaly’.¹¹

The Scottish government’s argument drew strongly on popular fears of the use of human rights law by undesirable persons, suggesting that the money spent on paying damages to affected prisoners (already included in the budget for the Scottish Prison Service!) could be

⁷ 2005 1 SC (IH) 307.

⁸ ‘Audit report reveals risk taken paying out false slop-out claims’ (*The Herald* 30 March 2009)

⁹ Jamieson (n 4).

¹⁰ L Adams, ‘Plea over slopping out payments’ (*The Herald* 26 June 2008)

¹¹ Press release, ‘Agreement to end slopping out anomaly’ (19 March 2009)

<http://www.scotland.gov.uk/News/Releases/2009/03/19121655>

‘put to better uses’¹² and indeed could be better spent on services for pensioners.¹³ The figure of £50m was presented on a number of occasions, although O’Neill criticises the ‘repeated but unsubstantiated’ use of this statistic.¹⁴ This approach can be situated in the trend in UK-wide political discourse where ministers with responsibility for human rights appear to be quite concerned about the use of these laws by certain individuals, noting for example the various calls made by the Minister for Justice for the development of new human rights instruments based on rights and responsibilities, with the Shadow Minister calling for the repeal of the Human Rights Act itself. As the Scottish Justice Secretary puts it in this case, the affected applicants include some persons who ‘have committed extremely serious and indeed appalling crimes’. This is exacerbated by the same Secretary’s reliance on the argument that the Scottish government deserves equivalent ‘protection’ to that of the UK government. While language of equality in terms of protection is familiar to human rights lawyers, the systems of rights protection in the UK in their current manifestation protect the individual against the State and the ‘protection’ of public authorities against the individual is and should be secondary at best.

It is also troubling to see the case based on the short-term financial needs of a government. The introduction of a time bar demands the most careful consideration, and the arguments advanced with respect to damages claimed by convicted prisoners may not be as persuasive as applied to other human rights claimants that would be unable to seek redress (whether for damages or otherwise) as a direct result of this proposal. Furthermore, the availability of damages in judicial review more generally is being considered by the Law Commission¹⁵ (for ‘truly public’ activities but, crucially, without a requirement for the action to attract damages in private law or to be brought under the Human Rights Act), although it should be noted that it has been suggested that it is difficult to predict the impact of the vaguely-drafted proposals of the Commission.¹⁶ Nonetheless, given the Commission’s fundamental argument that such remedies should be available to the affected citizen in appropriate cases, the treatment of damages in the context of the Scotland Act as being somehow particularly threatening to the

¹² Press release, ‘Compensation for prisoners’ (11 March 2009)

<http://www.scotland.gov.uk/News/Releases/2009/03/11135815>

¹³ Radio 4 (n 1)

¹⁴ O’Neill (n 6) 271.

¹⁵ Law Commission, ‘Administrative Redress: Public Bodies and the Citizen’ (Law Com CP No 187).

¹⁶ C Brasted & J Potter, ‘Damages in judicial review: the commercial context’ [2009] JR 53, 55.

public finances is not necessarily consistent with the emerging understanding of damages under public law.

3. THE LEGAL SOLUTION: AMENDING THE SCOTLAND ACT

The approach now being taken deserves further explanation. It was intended that the legislative changes be made at the earliest opportunity with the time bar applying to cases raised on or after 31st July 2009,¹⁷ although the eventual result was that cases brought after 2nd November 2009 would be affected.

A draft order under the Scotland Act was first laid before both Parliaments, and subsequently made by the Privy Council. This order, the Scotland Act 1998 (Modification of Schedule 4) Order 2009, permitted the Scottish Parliament to amend the Scotland Act to introduce a limitation period for claims against the Scottish government on the grounds that an act is incompatible with the Convention rights. Without this order, the Scottish Parliament could not act; amending the Scotland Act generally, for understandable reasons, falls outside the legislative competence of the body created by the Scotland Act. However, the order also defines the ‘relevant period’ in similar terms (though without reference to) the system in place under the Human Rights Act: one year, subject to the ability of a court to extend in the interests of justice. Pursuant to s 115 of the Scotland Act, this order required the approval of both Parliaments before the order was made through the Privy Council. This was secured with little difficulty. In Westminster, there was a general welcome for the order, with the established talking point of the undesirable prospect of spending £50m on ‘compensating criminals and convicts’ making its way into the remarks of SNP MP Pete Wishart.¹⁸ O’Neill has criticised this ‘helter-skelter rush to change the constitution’ and is particularly concerned about the lack of legislative discussion, public consultation or consideration of broader implications.¹⁹

¹⁷ Scottish Parliament Written Answers (1 April 2009) S3W-22488.

¹⁸ House of Commons, First Delegated Legislation Committee (11 May 2009) cols 6-7.

¹⁹ O’Neill (n 6) 272-3.

In this context we can also note the lack of an impact assessment, with the Westminster document being accompanied by a note that no such assessments have been prepared and that it is for the Scottish Parliament to ‘consider the appropriateness’ of any legislation. In Edinburgh, though, the debate was similarly cursory, and the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 became law in summer 2009 without complication. The government’s policy memorandum confirms that no public consultation took place²⁰ and provides a brief justification in two paragraphs for the impact on human rights, arguing that the time limit is proportionate, meaning that the proposal is ‘not inconsistent’ with articles 6 and 13 of the Convention. The financial memorandum required by Scottish Parliament standing orders suggests that the legislation will ‘in due course deliver savings to the Scottish Administration’²¹ and also ‘restrict the ability of individuals’ to bring human rights cases under the Scotland Act. The short Bill was not amended during its passage, and the ‘emergency bill’ procedure was adopted. This was a slightly unusual approach to a decision that was by now almost two years old, despite the Scottish’s Justice Secretary’s statement that he makes ‘no apology’ for doing so, as it was ‘in the public interest’ to act before the summer recess. There was some dispute during the short debate on the point from which the one-year period would run, with it being noted that the Law Society of Scotland had suggested that it should run from the point a person became aware of facts rather than the date of the act itself. There were no amendments tabled so the notional committee stage took place in a matter of seconds as a committee of the whole house. The entire debate took less than 90 minutes (split between a morning and afternoon) and the Bill was passed without opposition.

4. THE QUESTION OF PRINCIPLE: SHOULD LIMITATION PERIODS APPLY TO ACTIONS FOR BREACH OF FUNDAMENTAL RIGHTS?

The Human Rights Act was, of course, a major development in the protection of fundamental rights in the UK legal systems. However, for present purposes we can note the fact that the ‘new’ procedures for breach of the Convention rights, introduced by the Act, are based on a statute and resemble familiar procedures with respect to judicial review of administrative

²⁰ Policy memorandum to Convention Rights Proceedings (Amendment) (Scotland) Bill, SP Bill 28-PM [22]

²¹ Explanatory memorandum to Convention Rights Proceedings (Amendment) (Scotland) Bill, SP Bill 28-EN.

action in some ways. The situation is somewhat clearer than other jurisdictions (such as New Zealand), where courts were forced to ‘discover’ the power to grant a remedy for breach of rights. Relying on a compelling argument that rights require a remedy in order to be significant, these jurisdictions have adapted quite comfortably to this new reality: the Human Rights Act, then, is clear in providing for the power to grant ‘just satisfaction’ in respect of a claim for breach of the Convention rights. This clearly encompasses the range of remedies available to the court and explicitly includes damages. The Scotland Act falls somewhere between the two, with no general statement of the right to challenge an action for failure to comply with the Scotland Act, but clearly acknowledging that something of that nature exists, with its references to the (Human Rights Act) definitions of damages and of victim. Indeed, *Somerville* itself is the case that clarifies this, with the House of Lords divided on this point as on many others.

Given that the time limit for an application for judicial review in England and Wales under s 31(6) of the Supreme Court Act 1981 and CPR Part 54 requires the application to be made promptly and in any event within three months (with the court being able to extend in appropriate cases), the one-year limit under the Act seems quite generous. On the other hand, the generosity is tempered by the provision that, where a stricter rule applies to a particular action, that period will apply (with subsequent confusion regarding the interplay between the judicial review rule and the ‘new cause of action’ under section 7).²² The court maintains the ability to set the rule aside where necessary, and it is also clear that the limitation is not relevant where the Act is being used in a defensive fashion. It should also be noted that, in Scotland, there is no limitation period applicable in the case of judicial review;²³ instead, the defender can enter a plea calling the court’s attention to the delay in making the application (typically formulated as *mora*, taciturnity and acquiescence), which is considered to be a plea on the merits rather than a truly preliminary matter.²⁴ It is applied on a regular basis without much difficulty. See for example the decision in *Re Co-operative Group*, where the test is described as simple and Lord Menzies weighs up the actions of both parties in a clear and methodical fashion, concluding that there had been no unreasonable or excessive delay in this

²² See e.g. D Nicol, ‘Limitation periods under the Human Rights Act 1998 and judicial review’ (1999) 115 LQR 216, 218

²³ A O’Neill, *Judicial Review in Scotland: A Practitioner’s Guide* (Edinburgh: Butterworths, 1999) [1.25].

²⁴ Clyde & Edwards (n 2) [13.20].

particular case.²⁵ It has, however, been suggested in the Scottish Civil Courts Review, published in 2009, that this plea is ‘not particularly well suited’ to judicial review, functioning as it is alleged to do against the public interest in the speedy resolution of disputes.²⁶ The recommendation of the Review, which did include a brief survey of time limits for judicial review across an unnecessarily small and selective group of common law jurisdictions (England/Wales, Northern Ireland, Ireland, New Zealand, and four provincial jurisdictions between Canada and Australia),²⁷ is essentially, as it also suggests in the case of standing, to adopt the English model.

Of course, the Convention itself provides that, in the case of the European Court of Human Rights, claims must be brought within six months of the time at which the applicant became aware of the final decision at a national level that pertains to the alleged violation. This is, according to the Court itself, a ‘basic principle’ with ‘no exceptions and no possibility of waiver’.²⁸ However, this is of limited use to national systems of rights protections, as it is typically the case that the ‘final decision’ is given on a clearly defined date and is usually the end of protracted legal proceedings. The domestic remedy under the Human Rights Act is a much broader concept and is not necessarily based on a recorded judicial decision; in many cases, it is the action of an agent of the State. The idea of a limitation period for judicial review itself, too, is not some ancient doctrine of English law: until 1977, only certiorari was subjected to a (6-month) limit, with other claims being governed by the ability of the court to consider delay as a factor when considering whether to make use of one of the prerogative orders.²⁹ Indeed, in the light of the argument that the three-month period encourages speedy filing of claims (and a consequent disfavouring of negotiation), the late-century reforms cannot be considered to be either an unqualified success or a core aspect of English public law. The Human Rights Act, then, in terms of limitation periods, represents a timid addition to a restrictive and unsettled doctrine, and must surely be appropriately questioned. It is interesting to note that this restriction was not included in the original draft of the Act, and

²⁵ [2008] CSOH 28 [58-61]

²⁶ Scottish Civil Courts Review, ‘Report’ (September 2009) volume 2, 32.

²⁷ Ibid volume 2, 171.

²⁸ *O’Loughlin v UK* ECHR (25 August 2005) App no 23274/04 (admissibility decision)

²⁹ P Craig, *Administrative Law* (6th ed.) (London: Sweet & Maxwell, 2008) [26-045]

was introduced at committee stage in the House of Commons.³⁰ More importantly, though, there are workable examples of more generous approaches that can be drawn upon, both in the neighbouring jurisdiction of Ireland and in the developing legal tradition of the Commonwealth Caribbean.

THE OTHER WAY: COMPARATIVE PUBLIC LAW

Under the Constitution of Ireland, there is a well-developed doctrine of proceedings for wrongful interference with a constitutional right,³¹ though it is important to note that the Constitution provides for the judicial review of legislation, meaning that the Supreme Court has much stronger powers than equivalent courts in jurisdictions where parliamentary supremacy is still the guiding force. As in New Zealand, the approach taken by the courts was that the rights demanded a remedy. Walsh J put it best in an important case regarding the extent of the new State's prerogatives in 1972, writing that 'where the people by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available'.³²

In the case of a non-legislative breach of constitutional rights, there are no specific procedures laid down by the Constitution, and it is generally presumed that a range of options are available,³³ though with increasing skepticism about the ability to issue mandatory orders against the State in certain cases.³⁴ There are therefore no constitutional time bars, although in certain cases, particularly where damages are concerned, the Supreme Court has – for the time being – agreed that the limitation periods applicable in tort (six years, pursuant to the Statute of Limitations) would apply,³⁵ despite some criticism of this approach on the grounds that the policy reasons behind limitation periods may differ between tort and constitutional

³⁰ For discussion of this point, see Nicol (n 22), Himsworth (n 4).

³¹ The term preferred by McMahon & Binchy, *Irish Law of Torts* (Dublin: Butterworths, 2000) (3rd edn) [1.09].

³² *Byrne v Ireland* [1972] IR 241, 279.

³³ G Hogan & G Whyte, *Kelly: The Irish Constitution* (4th edn) (Dublin: Lexis-Nexis Butterworths, 2004) 1302.

³⁴ See for example *TD v Minister for Education* [2001] 4 IR 259.

³⁵ *McDonnell v Ireland* [1998] 1 IR 134. In the light of the Scottish controversy, it is interesting to observe how this case arises from a freshly-discovered constitutional violation (relating to dismissal from employment as a public servant) in *Cox v Ireland* [1993] 2 IR 503 being relied on by a separately affected party long after the second litigant's dismissal occurred.

actions.³⁶ The question of the compatibility of limitation periods with the Constitution itself has been raised, though not answered directly to date.³⁷ Damages are clearly recoverable for breach of constitutional rights – including by non-state actors³⁸ and including exemplary damages³⁹ – in a case where there is no existing, appropriate cause of action that would be an appropriate remedy.⁴⁰

The approach taken in many Commonwealth jurisdictions, particularly those in the Caribbean, is interesting, and deserves consideration in the light of the devolution debates in the UK. While this was not a factor in the *Somerville* case, and care must be taken not to equate the postcolonial evolution of the Caribbean states with devolution in the UK, valuable lessons can be learned from considering the experiences of such systems. In particular, the critical role of *ultra vires* as a doctrinal element in the development of Commonwealth Caribbean constitutional law, and the ongoing supervision of the Privy Council of this doctrine (any states still retain a right of appeal to the Privy Council, although a small number have opted for the nascent Caribbean Court of Justice (CCJ) as an alternative), should be scrutinized.

In general, the emerging states adopted a constitution at the moment of independence or autonomy. The prevailing approach here is one of focusing on acts considered to be *ultra vires* the new legislatures. Legislative power was thus exercisable subject to the Constitution, which in each case included significant statements of fundamental rights. Thus, the new legislatures and Governments were ‘born’ with this textual restriction (in many cases entrenched), and it was not difficult to establish that it was possible to instigate proceedings in the new courts against the State for breach of the Constitution. These remedies include damages and this is an accepted feature of Commonwealth Caribbean public law. The Privy Council frequently deals with the question of constitutional damages, generally holding them

³⁶ McMahon & Binchy (n 31) [1.56]-[1.58].

³⁷ For example, it is suggested (in *Cahill v Sutton* [1980] IR 269) that absolute limitation periods may themselves be unconstitutional: Kelly (n 33) 859; see also the discussion on the right to sue as a chose in action (and therefore a personal right protected by the Constitution): McMahon & Binchy (n 31) [4.76]-[4.80].

³⁸ *Meskeil v CIE* [1972] IR 241

³⁹ *Conway v INTO* [1991] 2 IR 305; *Shortt v Commissioner of An Garda Síochána* [2007] IESC 9.

⁴⁰ This is quite a significant limitation and means that the impact of the right to sue is in practice quite limited: *W v Ireland (no 2)* [1997] 2 IR 141.

to be a remedy envisaged by the relevant constitutions,⁴¹ but not strictly a tort,⁴² and exemplary damages (by whatever name known) are available. In 2009, it was confirmed in a case originating in the Bahamas that while damages redressing breaches of constitutional rights share objectives with exemplary damages under common law, the better approach is to class them as constitutional or vindicatory damages,⁴³ with the jurisprudence of the Privy Council being separately described as based on a general objective of vindication rather than punishment.⁴⁴

In terms of time limits, then, there is no formal limitation, but in general, courts can and do take delay into account. For example, in the case of the current constitution of Guyana, section 153 provides a clear procedure for applying to the High Court for redress for a breach or threatened breach of fundamental rights, without prejudice to any other lawfully available action. The High Court's powers are also clear: 'make such orders, issue such writs and give such directions as it may consider appropriate' for the purpose of enforcing fundamental rights. As Guyana has accepted the jurisdiction of the CCJ, it is also useful to point to a pair of CCJ decisions, *Edwards*⁴⁵ and *Sealey*,⁴⁶ delivered in December 2008, where individuals brought actions for breach of fundamental rights in respect of events of between 10 and 20 years ago but were unable to do due to abuse of process on the grounds of delay.⁴⁷ It should also be observed how while many jurisdictions have an English-style limitation period of three months for judicial review,⁴⁸ this does not apply to the specific action for a breach of constitutional rights.

5. FURTHER ANALYSIS: WAS THE SOLUTION A SUITABLE ONE?

⁴¹ *Maharaj v AG (Trinidad and Tobago) (No 2)* [1979] AC 385; *AG (Trinidad and Tobago) v Ramanoop* [2005] UKPC 15 [19]

⁴² *Maharaj*.

⁴³ *Takitota v AG (Barbados)* [2009] UKPC 11 [15].

⁴⁴ E Ventose, "Vindicatory Damages" for Infringements of Constitutional Rights in the Commonwealth Caribbean' (2009) 125 LQR 246, 247.

⁴⁵ *Edwards v AG (Guyana)* [2007] CCJ CV 3

⁴⁶ *Sealey v AG (Guyana)* [2007] CCJ CV 4

⁴⁷ *Edwards* [22]; *Sealey* [13].

⁴⁸ R Ramlogan, *Judicial Review in the Caribbean Commonwealth* (Abingdon: Routledge-Cavendish, 2007) 158.

The solution sought by the Scottish government will lead (through the legislative mechanism outlined above) to violations of Convention rights by devolved authorities being treated in a similar fashion to that of the Human Rights Act across the UK, i.e. a one-year limitation period. The attraction of this approach is twofold. It may prevent further claims on the Scottish public purse by prisoners (presumably freeing up the money for the beloved pensioners) and it would also prevent future human rights controversies from attracting unlimited liability, should a similar situation arise in the future.

However, this approach is also a change to the type of devolution that is in place in Scotland, and to the ‘radical constitution’ (in O’Neill’s terms)⁴⁹ that was emerging as a result of *Somerville* and other decisions. It would effectively change the fundamental rights aspects of the Scotland Act into a carbon copy of the Human Rights Act, at least as far as administrative action is concerned. Indeed, one factor worth considering is that it appears that non-Convention applications for redress under the Scotland Act will not be subject to the new limitation period (as the new parts of section 100 of the Scotland Act apply to Convention issues alone), and indeed would be governed by the broader Scottish rules of pleading delay rather than relying on CPR Part 54. Thus, there may be different limitation periods applying to Scotland Act applications based on whether the matter relates to the Convention or not. On the other hand, divergence between ‘traditional’ judicial review and UK human rights law is not necessarily a problem; judicial review and the Human Rights Act in England and Wales differ in terms of standing (compare the requirement for ‘sufficient interest’ for the former and status as a ‘victim’ for the latter) and amenability. Furthermore, there are other significant differences (aside from limitation periods) between judicial review in Scotland and England.⁵⁰ In addition, the question of whether the post-amendment approach would itself be the subject of legal challenge, a suggestion already made by the vice-chair of the Faculty of Advocates,⁵¹ is also an important one.

⁴⁹ O’Neill (n 5) 121.

⁵⁰ C Himsworth ‘Devolution and its jurisdictional asymmetries’ (2007) 50 MLR 31, 50. One useful example is how some private bodies are subject to judicial review in Scotland but not in England: O’Neill (n 23) [1.25].

⁵¹ D Maddox, ‘Slopping-out: Bid to stop payouts ”will cost taxpayer even more”’ (*The Scotsman* 20 March 2009)

It has been suggested that distinguishing between ECHR matters and non-ECHR matters is undesirable.⁵² If that is the case, then the focus should then be on what is proper and just in terms of the ‘Scotland Act remedy’, but without automatic regard to the Human Rights Act. The latter Act is, by the standards of fundamental rights law, and despite its important impact within the UK, a relatively weak response to the challenge of State violations of rights, clearly influenced by the British (or perhaps English)⁵³ history of a strong Parliament and weak judicial review. The new Parliament in Scotland was, like the parliaments across the Caribbean, created from a different mould. All statutes of the Parliament are subject to a strong form of judicial review, as is the case in jurisdictions like Ireland. Although constitutional reform (restricting executive powers and immunities) in some Commonwealth states has been argued to be a response to the absence of some cultural restraints more apparent in Westminster than in the Caribbean,⁵⁴ it remains interesting how a range of Commonwealth constitutions, through various ways, have been able to handle a greater degree of restraints on the abuse of fundamental rights within a Westminster-like constitutional structure.

Therefore, the arguments for a limited approach to judicial scrutiny that were so important in the case of the Human Rights Act should not be determinative. Instead, the Scotland Act remedy for breaches by Government should be seen as part of a new constitutional arrangement, complementing the ability of the courts to annul Acts of the Scottish Parliament. It would then be appropriate to consider what, if any, restrictions should be placed on the use of this provision. It is not inappropriate to ‘borrow’ Human Rights Act definitions, but in the case of limitation periods, the Scotland Act could include a statutory statement that a court can take delay into account (as the Caribbean courts and the Privy Council do, or indeed the Scottish courts in dealing with pleas of *mora*), as an alternative to copying across the Human Rights Act’s restrictive presumption of a one-year period. This would be consistent with the definition of the Scottish Parliament set out in *Whaley v Lord*

⁵² Jamieson (n 4) 293.

⁵³ The suggestion of an alternative (albeit also flawed) approach to limited government in Scotland is, for example, argued by O’Neill (n 5).

⁵⁴ Report of the Wooding Commission (1974) (Trinidad & Tobago), reproduced in W Dale, ‘The making and remaking of Commonwealth constitutions’ (1993) 42 ICLQ 67, 69.

*Watson*⁵⁵ by Lord Rodger in the context of a dispute that suggests the difference between the Westminster and Scottish Parliaments. This case encompassed a challenge to internal procedures that would be highly unlikely in the case of the former, but was able to proceed without significant problems as regards the latter. Following a suggestion that the Scottish Parliament is part of a 'wider family of parliaments' along with many Commonwealth nations, Lord Rodger summarises the issue by writing that the new Parliament is not sovereign, but instead subject to the law.⁵⁶

There is some academic interest in the application of the Human Rights Act and how it does or does not 'mirror' existing areas of law. Both Varuhas⁵⁷ and Steele⁵⁸ have criticised the restrictive approach taken by UK courts to the question of remedies, arguing that the attempt to follow Strasbourg jurisprudence on questions like the quantum of damages is neither required by the Convention nor a desirable way to manage claims based on the violation of fundamental rights. While neither author addresses the question that we consider here, there is certainly a valid argument that the emerging Scottish situation is a veritable house of mirrors, in that it brings into the Scotland Act (despite its special constitutional status) a restrictive reflection of what is already a restrictive approach that is integrated into the Human Rights Act - a far cry from a new constitutional model. Steele's argument that the approach taken under other constitutions for compensating the victims of the violation of fundamental rights should be scrutinised⁵⁹ is an important one, in the context of the ability of Commonwealth courts based on devolutionist theories not entirely unfamiliar in a Scottish context to manage claims arising out of their constitutions without a restrictive one-year rule.

The position of the Scottish government is indeed a difficult one, and deserves some sympathy. In particular, it is understandable how a sub-national government under devolved arrangements would feel aggrieved at the prospect of being held to a higher standard under human rights law than the national authority, with the same violation being treated differently depending on which government is running the service in question. However, this point is

⁵⁵ *Whaley v Lord Watson of Invergowrie & the Scottish Parliament* 2000 SC 340 (IH).

⁵⁶ Also highlighted by O'Neill (n 6) 288 fn 47.

⁵⁷ J Varuhas, 'A tort-based approach to damages under the Human Rights Act 1998' (2009) 72 MLR 750, 755.

⁵⁸ J Steele, 'Damages in tort and under the Human Rights Act: remedial or functional separation?' (2008) 67 CLJ 606, 611.

⁵⁹ *Ibid* 613.

subject to challenge in two ways. The government can reduce its exposure by ensuring that its acts are compliant with the Convention, and there is already greater protection given to human rights in Scotland, as a result of the ability of the courts to annul Acts of the Scottish Parliament for breach of Convention rights, a power not granted to courts in respect of Westminster legislation.

To its credit, the Scottish government rejected the rather simplistic suggestion of creating a new Scottish time bar, on the grounds that it would be unfair to claimants and indeed would go against the recommendation of the Scottish Law Commission that the limitation period be extended in certain cases.⁶⁰ However, if this point is true – and it is a persuasive one – the rationale for restricting all future cases based on fundamental rights to a single year while allowing claims to be brought under delict without such disproportionate restrictions must be questioned, and the Scottish government asked if it is engaging in demonization of one group of human rights claimants (prisoners) with unpredictable and potentially unfair consequences for others. Indeed, while it is easy to see the logic of the Irish defence of a (tort-equivalent) limitation period, explained by Keane J in the Supreme Court as ensuring that the victim of a personal injury should not be treated as less deserving of time than that of a violation of privacy⁶¹ (which in Ireland is, in the absence of appropriate legislation, dealt with as an action for breach of constitutional rights), the strong case made by the Scottish Law Commission on the unfairness of three-year limitation periods in personal injuries suggests that insufficient consideration has been given to the potential injustice that the Scotland Act proposal could create in the other direction. If a full and proper consultation had taken place, as discussed above, these points could well have been considered.

CONCLUSION

The current Scottish government is in a difficult position when it comes to questions of constitutional law like this one. While it has indeed engaged in a constitutional debate through the ‘National Conversation’, leading to the publication of a white paper in late

⁶⁰ Scottish Law Commission, ‘Personal Injury Actions: Limitation and Prescribed Claims’ (Scot Law Com No 207).

⁶¹ [1998] 1 IR 134, 160.

2009,⁶² it is also faced with governing – and seeking the amendment of – aspects of the existing constitutional settlement that are not directly related to the overall questions of sovereignty, autonomy and independence. The decision in *Somerville* was a decision of the UK House of Lords (albeit including some Scottish judges) overturning the Court of Session,⁶³ and of course the (UK) Scotland Act, which the Government has its own critique of, has created a subordinate legislature and executive that do not enjoy the advantages of parliamentary supremacy or limited scope of challenge under the Human Rights Act. The UK Government is sympathetic to this dilemma, emphasizing that it wishes to retain the link between ‘the competence of Scottish Ministers and the Scottish Parliament under the devolution settlement’ and compliance with the ECHR.⁶⁴ Nonetheless, this is a curious phrase. Clearly the link remains present through the legislative device of amending the Scotland Act rather than mere application of the Human Rights Act, but the practical impact is that the Human Rights Act is duplicated into an illusory concept of an autonomous link between competence and compliance.

That said, applying the Human Rights Act without special reference to Scotland (through duplication) can be seen as part of a challenge to the premise that Scotland maintains a distinctive legal system and that the devolved arrangements are a constitutional guide (rather than a statute for managing minor aspects of local government) for Scotland. Although the Scotland Act was neither produced wholly within a separate Scots constitutional tradition nor by the present government, it could still have been approached in a different fashion. The same Scottish Justice Secretary gave a passionate defence of the differences between (long-established) Scots and English law during the controversy that followed the release of Abdelbaset al-Megrahi in August 2009. al-Megrahi was released under the power regulated by the Prisoners and Criminal Proceedings (Scotland) Act 1993. MacAskill expressed a firm view that humanity is a ‘defining characteristic of Scotland and the Scottish people’⁶⁵ and confirmed (in a sentence added to the statement in the version subsequently given in

⁶² Scottish Government, ‘Your Scotland, Your Voice’ (30 November 2009)

⁶³ This conflict is explored in Himsworth (n 4) 326.

⁶⁴ Explanatory Memorandum to Draft SI 2009/1380 [7.2]

⁶⁵ K MacAskill, ‘Decisions on the applications for prisoner transfer and compassionate release in relation to Abdelbaset Ali Mohamed Al-Megrahi’ (20 August 2009) <http://www.scotland.gov.uk/News/This-Week/Speeches/Safer-and-stronger/lockerbiadedecision> ; see also Scottish Parliament Official Report col 18996 (24 August 2009).

Parliament)⁶⁶ that he ‘stand(s) by the values and laws of Scotland’. In the case of a constitutionally useful response to *Somerville* and *Napier*, a similar approach would surely have been possible. Rather than seeking the duplication of the comparatively restrictive English and UK doctrines of limiting the rights of the citizen against government, the Government could have acknowledged the benefits of the generous approach to individual rights in the context of Scottish and Commonwealth constitutional traditions. Indeed, an advanced system of human rights protection as part of a coherent constitutional package would surely be a much better statement of confident, outward-looking Scottish identity (or autonomy, for those committed to such) than an attempt to minimize the impact of human rights law within a new political settlement by reference to the traditional (and internationally unusual) limitations of British parliamentary supremacy and deference to the executive. As O’Neill suggested in a recent issue in this publication, ‘returning to an examination of the first principles of constitutional democracy’⁶⁷ may be a useful approach in the light of cases like *Somerville* and the ongoing discussion on Scotland’s constitutional future. The populist direction, cynical and financially-driven approach to fundamental rights and undue haste of the amendment of the Scotland Act should not be the end of this affair, but serve as an example of the dangers of constitutional discussions being dominated by short-term political necessity.

⁶⁶ Scottish Parliament Official Report col 18995 (24 August 2009).

⁶⁷ O’Neill (n 5) 127